SUPREME COURT, U.S.
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No. 88-1683

IN THE

SUPREME COURT OF THE UNITED STATES

SHELDON HALL CLOTHING, INC.,
SHELDON MEHRMAN t/a MEYER D. MEHRMAN &
SON and SHELDON MEHRMAN,
Petitioners

v.

TRUSTEES OF THE AMALGAMATED INSURANCE FUND,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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a. Summary of Argument

The Employee Retirement Income Security Act clearly was designed to permit collection by a multi-employer fund on delinquent contributions whether or not the arbitration award is confirmed. The language of the act contains no mandatory requirement for confirming the arbitration award and, furthermore, since withdrawal liability is paid in installments, it would seem illogical to require the confirmation of an award utilizing an already busy Federal Court system even though the withdrawing employer may not become delinquent until well after 30 days following the award. Obviously, the Act contemplated utilization of the 3-year/6-year statute of limitations even if there is an arbitration award.

The present interpretation of ERISA by the Federal Courts clearly mandates that all employers in a control group are jointly and severally liable and that service of process upon one employer is service upon all employers in the control group.

29 U.S.C. 1132(G) states that a fund is entitled to interest on unpaid contributions plus liquidated damages in an amount equal to the greater of interest on the unpaid contributions or liquidated damages provided for under the plan in an amount not in excess of 20%. Clearly, liquidated damages in an amount equal to the interest on the unpaid contributions is permissible under ERISA and less then 20% as authorized by the Act.

b. Argument

I. THE COURT BELOW CORRECTLY FOUND THAT THE WITHIN ACTION COULD PROCEED AS AN "INDEPENDENT ACTION: UNDER 29 U.S.C. 1451.

It is submitted that the design of ERISA is to permit collection actions within the limitation period established under Section 1451(f) irrespective of whether the arbitration award is timely confirmed under 29 U.S.C.

Section 1401(b). It should be noted that 29 U.S.C. Section 1401(D) states in part:

> ". . . If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of Section 515). [29 U.S.C. Section 1145]."

Independent of enforcing an arbitration award, the respondent in this matter has a right to collect delinquent contributions prior and subsequent to the entry of an arbitration award. It should be noted that 29 U.S.C. Section 1401(b) states:

> "Any party *may* bring an action, no later than thirty days after the issuance of an arbitration award. . . . to enforce, modify or vacate the arbitration's award." [emphasis supplied].

The Section specifically uses the word "*may*" indicating that confirmation of an award is not mandatory.

In fact, the Court below held that the petitioner's proposed construction of 1401(b)(2) "would run counter to common sense." (App. 7). The Court correctly stated that:

> "If thus seems clear, when attempting to give effect to all of the statute's component parts, that Congress did not intend that the arbitration provision of Section 1401 be used to enforce an arbitrator's award." (App. 7).

If the intent is to limit a Plan to confirmation of an award within thirty days, an employer would simply be able to frustrate collection by making installments as they become due and thereafter, at a point in time beyond the thirty day period simply refuse to make any further payments. Then, the Fund would be barred from bringing an action in Federal Court to collect the additional unpaid withdrawal liability. It is obvious that

Congress would not intend such an interpretation of ERISA which would lead to a frustration of a plan from collecting a delinquent amount awarded by the arbitrator. A logical interpretation as reasoned by the Court below is to treat assessed withdrawal liability similarly to delinquent contributions and, therefore, the time limitation of 1451(f) being either three or six years should apply.

Clearly, the respondent in this matter should not be barred from collecting withdrawal liability which by interpretation of the act is construed as a delinquent contribution simply for failure to confirm an award in thirty days, which said confirmation by the language of ERISA is, in fact, not mandatory in any event.

II. THE COURT CORRECTLY DETERMINED THAT SHELDON MEHRMAN IS INDIVIDUALLY LIABLE IN AN ACTION FOR WITHDRAWAL LIABILITY UNDER ERISA.

The Third Circuit Court of Appeals in the matter of *IUE-AFL-CIO Pension Fund vs. Barker & Williamson*, 788 F.2d 118 (3rd Cir. 1986), held that notice of withdrawal liability to one member of a "common control group" is notice to all the members of the group. Testimony in this matter, as well as joint exhibit 1 indicate that notices were mailed to Sheldon Mehrman, Inc., Sheldon Mehrman, President of Sheldon Mehrman, Inc. and Meyer Mehrman. The Court below stated that Notice to Sheldon Mehrman, Inc. was proper and, therefore, would constitute legal notice to Meyer Mehrman & Sons (App. 10). Such notices are sufficient to satisfy the requirements of ERISA for notification of withdrawal liability to all members of that common control group. Under the circumstances, Sheldon Mehrman, individually, having notice of this action cannot now shield himself with the argument that he was not a party, since it is clear that any member of a control group

are jointly or severally liable and should be treated as a single employer and, therefore, bound by the decision of arbitrator. See *Teamsters Pension Fund Trust vs. H.F. Johnson*, 830 F.2d 1009, 1013 (9th Cir. 1987).

III. THE COURT CORRECTLY PERMITTED PLAINTIFF TO ASSESS 10% PER ANNUM INTEREST WHICH WAS THE RATE PROVIDED FOR BY THE PLAN, AS WELL AS AN ADDITIONAL 10% PER ANNUM AS LIQUIDATED DAMAGES ON THE PRINCIPAL AMOUNT OF THE JUDGMENT.

Several cases have determined that when withdrawal liability installment payments are not paid when due, the plan is entitled to treat the failure to pay the withdrawal liability as a delinquent contribution. See *Lad's Trucking vs. Board of Trustee*, 777 F.2d 1371, 1374 (9th Cir. 1985) and *Trustees of the Amalgamated Insurance Fund vs. Geltman Industries, Inc.*, 784 F. 1926 (9th Cir. 1986). Section 1451(b) of ERISA directs that any action to compel payment of withdrawal liability shall be treated as an action to collect delinquent contributions in accordance with 29 U.S.C. 1145. See *Penn Electric Company v. United Retail & Wholesale Employees Union Local 115 Joint Pension Fund*, 792 F.2d 45 (3d Cir. 1986).

29 U.S.C. 1132(g) requires that any judgment include interest on the unpaid contributions *and* liquidated damages in "an amount equal to the greater of (i) interest on the unpaid contributions, or (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent . . . ."

Since the plan provided for interest at the rate of 10%, the act specifically authorizes additional damages of 10% per annum being the interest which is provided for under the plan as testified to by Jeffrey Warbet, the

plan's representative at the trial of this matter. Therefore, the award of the Court is clearly in accord with the statutory authority of 29 U.S.C. 1132(g).

c. Conclusion

For all of the above reasons the respondent respectfully requests this Honorable Court to dismiss the Petition for Certiorari.

Respectfully submitted,

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Certification of Bar Membership

I, Michael S. Silberman, certify that I have been admitted to membership in the Bar of the United States Supreme Court and I am presently a member in good standing of that Bar.

_____

Michael S. Silberman